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NO. 88 - _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE A. G. BOONE COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and TEAMSTERS LOCAL UNION NO. 171, *etc.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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45p

QUESTION PRESENTED

Has the Court of Appeals improperly allocated to an employer respondent the ultimate burdens of proof and persuasion upon issues of discriminatory intent and of "pretext" arising from its business decisions, without concluding, as the National Labor Relations Act commands, that all allegations of discriminatory intent were proved by a preponderance of evidence?

PARTIES TO THE PROCEEDING[1]

All parties to the proceedings below are named in the caption.

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[1] In compliance with Rule 28.1, according to information supplied to counsel for The A. G. Boone Company, it is affiliated with **A. G. Boone Sales & Service Co.** in the sense that the corporations have common private ownership.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner respectfully prays the Court for a Writ of Certiorari directed to the United States Court of Appeals for the District of Columbia Circuit, to the end that the Court may review a decision rendered by the Circuit Court in a case involving the parties above-named,

and the Petitioner respectfully shows to the Court:

OPINIONS BELOW

The Opinion of the Court of Appeals is not yet officially reported but may be found in the Appendix filed herewith (Pet. App. 1-26).[2] The Decision and Order of the National Labor Relations Board in **The A. G. Boone Company (Teamsters Local Union No. 171, etc.)** likewise is not yet officially reported but is designated as 285 N.L.R.B. No. 133 (1987) and may also be found in said Appendix (Pet. App. 27-165).

JURISDICTION

The Opinion of the Circuit Court was entered on December 9, 1988 (Pet. App. 1-26). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Jurisdiction in the Court of Appeals rested upon 29 U.S.C. §160(e)&(f).

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[2] "Pet. App." refers to the Appendix filed with this Petition.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (29 U.S.C. §151 **et seq.**) ("the NLRA") are as follows:

Section 8(a)(3), 29 U.S.C. §158(a)(3), provides in pertinent part:

> **§158. Unfair labor practices**
>
> (a) It shall be an unfair labor practice for an employer --
>
> ...
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to ... discourage membership in any labor organization.

Section 10(c), 29 U.S.C. §160(c), provides in pertinent part:

> **§160. Prevention of unfair labor practices**
>
> ...
>
> (c) ... If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue ... an order.

STATEMENT

A.

Proceedings Below

In June, 1986, a Regional Director of the National Labor Relations Board (hereinafter "the Board") caused the initial Complaint to be filed in this case. That Complaint, as subsequently amended, alleged that The A. G. Boone Company (hereinafter "A. G. Boone") had committed various unfair labor practices in the course of and following a successful union organizational campaign by Teamsters Local Union No. 171 (hereinafter "Local 171").

By allegations most pertinent to the issues presented by this Petition, the Complaint asserted that A. G. Boone's decisions to relocate its Virginia terminal by thirty-seven miles and, on three separate occasions, to lay off numbers of its Virginia employees, were motivated by

unlawful discriminatory intent, and thus violated Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3). A. G. Boone denied these allegations, and a hearing was conducted before an Administrative Law Judge on October 7 and 8, 1986.

On December 31, 1986, the Administrative Law Judge issued a Decision finding and concluding that A. G. Boone's terminal relocation and its three layoff decisions were motivated by unlawful discriminatory intent (Pet. App. 115-149). A. G. Boone filed exceptions to these findings and conclusions with the Board.

By its Decision and Order dated September 24, 1987, a Board panel affirmed the discriminatory intent findings and conclusions relative to A. G. Boone's relocation and layoff decisions (Pet. App. 32-40). The Board's Chairman dissented,

stating that the record evidence did not support findings and conclusions that the two earliest layoff decisions were unlawfully motivated (Pet. App. 46-51).

Upon A. G. Boone's petition for review of the Board's Decision and Order, and upon the Board's cross-petition for enforcement of its order, a panel of the Court of Appeals for the District of Columbia Circuit ruled that the evidence supported findings of unlawful motivation in A. G. Boone's relocation decision and in two of its layoff decisions but not in its earliest layoff decision (Pet. App. 1-26).

A. G. Boone now respectfully petitions this Court to review the decision of the Circuit Court upon the discriminatory intent issues arising from the Company's terminal relocation and layoff decisions.

B.

The Factual Background

A. G. Boone for many years has been a contract carrier in the southeastern United States, specializing in the transportation of groceries and related items. The Company's headquarters and principal terminal are in Charlotte, North Carolina. As a contract carrier, A. G. Boone performs transportation services for a limited number of customers, primarily grocers and food distributors.

In 1979, A. G. Boone opened a trucking terminal in Montvale, Virginia, on the outskirts of Roanoke, to perform services both for a Kroger bakery in Roanoke and for a Kroger dairy about thirty-seven miles away, at Lynchburg, Virginia.

In May and June, 1986, the Company made decisions to lay off numbers of its

Virginia-based employees, and such layoffs were implemented in May, June, and August, 1986. At the time of the June layoff decisions, A. G. Boone made a concurrent but logically and factually unrelated decision to relocate its Montvale/Roanoke terminal operations to Madison Heights, Virginia, a Lynchburg suburb.

The Circuit Court has enforced those portions of the Board's Decision and Order which are based upon findings and conclusions of discriminatory motivation in the Company's June, 1986 decisions to lay off Virginia employees and its separate decision to relocate its terminal operations to the Lynchburg vicinity.

Those June, 1986 layoff and relocation decisions followed an unexpected permanent closing of Kroger's Roanoke bakery, which was effected by Kroger without any warning or notice to A. G. Boone.

After the Roanoke bakery closing, the Company was left with only a single Virginia account, namely the Kroger dairy at Lynchburg.

Prior to the Roanoke bakery closing, Local 171 had been certified as the statutory collective-bargaining representative of the Company's Virginia unit employees. It is most relevant and significant, however, that Local 171 did not even begin its organizing efforts until early in the year 1986.

Although such organizing efforts did not begin until early 1986, a witness for the General Counsel admitted that A. G. Boone repeatedly had specified "in one or more general meetings, over the course of the past three years", that the Company "possibly" would "close" the Montvale terminal "if it loses the bakery."

In response to the Roanoke bakery closing, A. G. Boone decided immediately to lay off four Roanoke drivers and one utility employee. In the context of this layoff decision, another witness for the General Counsel, who also was a Local 171 officer, testified that either three or four drivers had been needed to accomplish the Roanoke bakery work. When, after the Roanoke bakery closing, the amount of Lynchburg dairy work increased, two of the laid off drivers promptly were recalled to work at the Montvale/Roanoke terminal.

After and because of the bakery closing, and when that business had been lost (as had been feared for at least three years), A. G. Boone, instead of **closing** the Montvale/Roanoke terminal -- as it repeatedly had specified it "possibly" would do -- actually decided to **relocate** its Virginia terminal operation

to Lynchburg/Madison Heights, the site of its only remaining Virginia account, Kroger's Lynchburg dairy. After making this relocation decision, the Company selected and leased a terminal facility in the Lynchburg area. Thus, the relocation of the terminal operation was not effected until August, 1986.

As the Administrative Law Judge observed, A. G. Boone could have decided to conduct its operations from the new Lynchburg-area terminal site with the same or a similar complement of drivers that had been employed at the Montvale/Roanoke site. Lynchburg, like Roanoke, also is within Local 171's territorial jurisdiction, the Company's Virginia drivers still reported for work in the same general vicinity, and the Company, after the relocation, continued to recognize Local 171 as the representative of its Virginia employees.

A. G. Boone put into the record uncontradicted evidence that the terminal relocation would save Kroger approximately Eighty Thousand Dollars per year in mileage costs. Kroger, in previous years, had been sensitive to its transportation costs and previously had demanded of and received from A. G. Boone a reduction in its charges for the bakery work. The annual savings to Kroger undeniably made A. G. Boone more competitive in its efforts to retain or expand its work for the Lynchburg dairy.

It is clear that none of A. G. Boone's foregoing, uncontradicted reasons for relocating its Virginia terminal operations had anything to do with the question of how many employees it would employ at the new terminal site. The relocation decision indisputably was factually and logically unrelated to the contemporaneous

layoff decision. There is no record evidence that the Company's decision to relocate its terminal operations had anything to do with its layoff decision or that there could have been discriminatory motivation for the terminal relocation.

As above specified, A. G. Boone, after the Roanoke bakery closing, might have decided to employ the same or substantially the same number of Virginia employees at a new terminal location near the Lynchburg dairy, which was the only remaining Virginia account. At the time of the bakery closing, however, the Company admittedly needed three or four fewer Virginia drivers, that number of drivers' work concededly having been devoted to bakery "hauls". A. G. Boone decided, upon the bakery closing, that it could perform the Virginia work without four of the pre-closing complement of drivers and without

one utility man and laid off that number of employees. When, however, the dairy work after the bakery closing exceeded expectations, the Company promptly recalled two of the laid-off drivers. Indisputable evidence establishes that the Company experienced diminished profits after the bakery closing and that, but for the layoff, it would have experienced a much greater profit loss. Indeed, the Company's Virginia net profits were virtually eliminated when the two drivers were recalled. Upon these facts, the Board found and concluded, and the Circuit Court upheld the finding and conclusion, that the June, 1986 layoff of four drivers and a utility man was unlawfully motivated.

In addition to its decisions immediately after the bakery closing to relocate the Virginia terminal to the site of the Lynchburg dairy and to lay off four

drivers and a utility man, the Company also decided that, upon effecting the terminal relocation, it would substantially reduce the Virginia workforce that had been employed at the Roanoke terminal location. As has been described above, the decisions, upon the bakery closing, immediately to lay off five employees and to relocate the terminal in no way dictated or even influenced the separate decision to "scale down" the entire Virginia operation, utilizing substantially fewer Virginia-based employees.

Independent of the admitted fact that fewer drivers were needed after the bakery closing, and independent of the substantial savings and competitive advantage resulting from the terminal relocation, the Company presented uncontradicted evidence of very substantial, legitimate, and separate business reasons

for a significantly "scaled down" Virginia operation. The Company introduced uncontradicted evidence that annual cost savings in excess of $100,000.00 would result from its decision to "scale down" its Virginia terminal operations. Such savings resulted from eliminating supervisory employees, from reducing equipment needs and equipment maintenance costs, from eliminating terminal improvements and repairs costs, and eliminating or substantially reducing layover expense reimbursements. Again, such annual cost savings were in addition to the $80,000.00 annual mileage cost savings to Kroger resulting from the relocation of the terminal to Lynchburg.

Both the Board Decision and Order and the Circuit Court Opinion fail to address or even mention the Company's uncontradicted evidence of $100,000.00 annual cost savings resulting from the

decision to "scale down" its Virginia operations.

Instead, upon the foregoing evidence, the Board found and concluded that A. G. Boone's decisions to relocate its Virginia terminal to Lynchburg, to lay off five employees after the Roanoke bakery closing, and to lay off additional employees in connection with a "scaled down" Virginia operation, all were discriminatorily, and therefore unlawfully, motivated. And beyond enforcing the Board's order that all the laid-off employees be reinstated with backpay, the Circuit Court also enforced the Board's order that all such employees be reinstated at a reopened Montvale/Roanoke terminal.

REASONS FOR GRANTING THE WRIT

The Court of Appeals Has Decided a Federal Question in a Way in Conflict with Applicable Decisions of this Court or Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by this Court

A.

The Circuit Court Improperly Has Enforced a Board Order Based upon Findings and Conclusions of Discriminatory Intent, Imposing a Burden of Proof on the Respondent without Requiring Proof of a Prima Facie Case of Such Intent by a Preponderance of Evidence

The Court should review and reverse the Court of Appeals' decision because it erroneously applies the Board's allocation of evidentiary burdens in an unfair labor practice case presenting discriminatory intent issues, as such allocation has been approved in **N.L.R.B v. Transportation Management Corp.**, 462 U.S. 393 (1983).

The Court of Appeals' fundamental error is shown by the following quotation from its Opinion:

> The Company's early open hostility toward Union activity, and its 8(a)(1) violations, are clearly sufficient to establish a **prima facie** case that antiunion considerations were a motivating factor in **[all of?]** its decisions. Thus, under the **Wright-Line** test, once the **General Counsel made this showing**, the **burden** shifted to the Company **to prove** that it would have taken the same actions even in the absence of the protected conduct **[Emphasis added]** (Pet. App. 20).

Under the above-quoted application of the Board's **Wright-Line** allocation of evidentiary burdens, the Circuit Court **only** examines the evidence upon **some** of the unfair labor practice allegations, which did **not** present issues of discriminatory intent, to determine whether the the General Counsel proved a **prima facie** case upon **all** the unfair labor practice allegations in the case, including unfair labor practice allegations that **did** present issues of discriminatory intent. Relying only upon evidence of alleged threats to **close** the Montvale/Roanoke

terminal if the Union won the representation election and upon other evidence of antiunion animus that **predated** the Company's decisions to **relocate** its Virginia terminal and to lay off employees, the Circuit Court holds that the burden of **proof** shifted to the respondent employer on the allegations of discriminatory motivation in the terminal relocation and layoff decisions. Such holding misinterprets and misapplies the Court's **Transportation Management Corp.** decision.

In **Transportation Management Corp., supra**, the Court has stated that the question of whether the General Counsel has proved a **prima facie** case is to be determined upon the preponderance of the evidence, necessarily meaning **all** of the evidence:

> The Court of Appeals was quite correct, and the Board does not disagree, that throughout the proceedings, the General Counsel carries

> the burden of proving the elements of an unfair labor practice. Section 10(c) of the Act, 29 U.S.C. §160(c), expressly directs that violations may be adjudicated only "upon the preponderance of the testimony" taken by the Board. The Board's rules also state that "[t]he Board's attorney has the burden of pro[ving] violations of Section 8." 29 CFR §101.10(b) (1982). ...
>
> As we understand the Board's decisions, they have consistently held that the unfair labor practice consists of a discharge or other adverse action that is based in whole or in part on antiunion animus -- **or, as the Board now puts it, that the employee's protected conduct was a substantial or motivating factor in the adverse action. The General Counsel has the burden of proving these elements under §10(c) [by the preponderance of the testimony].** But the Board's construction of the statute permits an employer to avoid being adjudicated a violator by showing what his actions would have been regardless of his forbidden motivation. It extends what the Board considers to be an affirmative defense but does **not change** or add to the elements of the unfair labor practice that the General Counsel **has the burden of proving under §10(c). [Emphasis added]**

N.L.R.B. v. Transportation Management Corp., supra, 462 U.S. at p. 401.

The Circuit Court clearly has held that the General Counsel sustained the burden of proving that discriminatory intent "was a substantial or motivating factor" in A. G. Boone's layoff and relocation decisions without even addressing A. G. Boone's stated reasons for those decisions. As shown above, the Circuit Court holds that the General Counsel proved unlawful motivation in those decisions by merely and only proving antiunion animus in other contexts and without any examination of A. G. Boone's articulated reasons for its layoff and relocation decisions. The "substantial or motivating factor" element of the General Counsel's case has been deemed proved without any weighing of "the preponderance of the testimony" relative to the reasons for the layoff and relocation decisions.

The "affirmative defense" acknowledged by the Board in **Wright-Line** and by this Court in **Transportation Management Corp.** should be at issue only when unlawful motivation is admitted or when there is a "preponderance" of evidence that discriminatory intent "was a substantial or motivating factor" in relation to a particular decision. And only when there is such admission or "preponderance" of evidence should there be any **employer** burden of proof.

In A. G. Boone's case, the "direct" evidence of **antiunion animus** upon which the Circuit Court relies either predates, or relates to actions separate from, the Company's layoff and relocation decisions. A. G. Boone indisputably offered uncontradicted "direct" evidence of lawful and justifiable business reasons for its decisions. **At the very least, the Board and**

the Circuit Court should have weighed the "preponderance" of all the direct and the indirect evidence on the layoff and relocation issues before concluding that the General Counsel proved a prima facie case on those issues and that A. G. Boone had the burden of proof on an affirmative defense. It is manifest that neither the Board nor the Circuit Court weighed such evidence.

It is a commonplace that a prima facie case permits a finding in favor of the party who proves such a case. Under this Court's above-quoted holding in Transportation Management Corp., the Board's General Counsel has the burden of proving a prima facie case by a preponderance of evidence, and one element of that case as to the layoff and relocation decisions is that discriminatory intent was a substantial or motivating factor in the

employer's actions. By holding, without pretending to weigh all the evidence on the layoff and relocation issues, that the General Counsel proved a **prima facie** case on those issues, and upon such holding, by imposing upon A. G. Boone burdens of proof and persuasion, the Circuit Court has ignored this Court's specification of the case that the General Counsel must prove.

In its Statement of "The Factual Background" (pp. 7-17 of this Petition), A. G. Boone has set forth the uncontradicted and unrebutted business reasons it "articulated" for its layoff and relocation decisions. Although such evidence clearly outweighed evidence of antiunion animus that either predated, or related to actions other than, A. G. Boone's layoff and relocation decisions, it has been totally ignored by both the Board and Circuit Court upon mere recitation of the

erroneous legal proposition that A. G. Boone had burdens of proof and persuasion on the issues relative to the layoffs and relocation. And even if such burdens properly were imposed upon A. G. Boone, it should, upon this Court's review of the case, be held that the Company sustained them.

It is most evident that discriminatory intent could not have been "a substantial or motivating factor" in the Company's decision to relocate its Virginia terminal. The same employees clearly could have been employed at the nearby new terminal facility, which like the old terminal is within Local 171's territorial jurisdiction, and A. G. Boone has continued to recognize Local 171 as the representative of the employees at the new terminal location. The Company also proved uncontradicted and undeniable business

reasons for the relocation. Nevertheless, the Circuit Court enforces the Board's Order that all the laid-off employees be offered employment at the old Montvale/ Roanoke terminal facility.

Similarly, A. G. Boone proved uncontradicted and undeniable business reasons for its decisions to lay off five employees after the bakery closing and to "scale down" substantially its Virginia operations.

A Local 171 officer, who was a witness for the General Counsel, admitted that either three or four Virginia drivers had been assigned to bakery "runs", and the Company's decision was to lay off four drivers and one utility man when Kroger, without notice, permanently closed its bakery. The fact that A. G. Boone promptly recalled two of the laid-off drivers, when business following the bakery closing

exceeded expectations, tends to disprove rather than prove unlawful discriminatory motivation.

The Company's evidence that its decision to "scale down" its Virginia operations -- utilizing fewer Virginia-based employees -- would result in annual cost savings in excess of $100,000.00 was neither contradicted nor rebutted. Again, these savings were in addition to the $80,000.00 annual cost savings resulting from the separate terminal relocation decision. Nevertheless, such evidence is nowhere mentioned either by the Board's Decision and Order or by the Circuit Court's Opinion. Again, upon mere recitation that a burden of proof was imposed upon A. G. Boone, and without weighing the preponderance of the evidence as to the reasons for the "scaled-down" Virginia operations, the Court of Appeals has

affirmed the Board's findings and conclusions that discriminatory intent was "a substantial or motivating factor" in the Company's decision.

B.

The Circuit Court Improperly Has Enforced a Board Order Based upon Findings and Conclusions of Discriminatory Intent, Imposing a Burden of Proof on the Respondent in the Decision of "Pretext" Issues

As has been demonstrated above, the Circuit Court clearly has not weighed all the evidence to ascertain whether or not the Board's General Counsel proved a **prima facie** case of unlawful discriminatory motivation by a preponderance of direct or indirect evidence.

Indeed, as A. G. Boone has contended, there is no **direct** evidence of discriminatory intent influencing the Company's terminal relocation and layoff decisions. The evidence which the Court of

Appeals states established the General Counsel's **prima facie** case consists only of indirect evidence, because it relates to antiunion animus in contexts other than the Company's terminal relocation and layoff decisions (See quotation from the Circuit Court's Opinion at p. 19 of this Petition).

As also has been shown above, A. G. Boone undeniably offered **direct** evidence of entirely lawful motivation for its terminal relocation and layoff decisions, "articulating" clearly legitimate, nondiscriminatory reasons for those decisions. As the Company has argued, the Court of Appeals clearly did not weigh the preponderance of the direct or indirect evidence in its holding that a burden of proof was imposed upon A. G. Boone.

The Company respectfully asserts that, under the decisions of this Court,

there is no employer respondent burden of proof or persuasion except when unlawful motivation is proved by a preponderance of direct and indirect evidence or when such motivation admittedly contributed to the employer's action. Under this Court's decisions, when there is only indirect evidence of unlawful motivation, the employer only has a burden of going forward with evidence "articulating" a legitimate, nondiscriminatory reason for the action or decision in question.

> The Board has not purported to shift the burden of persuasion on the question of whether the employer fired Santillo **at least in part** because he engaged in protected activities. The General Counsel satisfied his burden in this respect and **no one disputes** it. Thus, **Texas Department of Community Affairs v. Burdine**, 450 U.S. 248 ... (1981), is inapposite. In that case, which involved a claim of racial discrimination in violation of Title VII of the Civil Rights Act of 1964, [citation omitted] the question was who had "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated

> against the plaintiff ... ." [citation omitted] The Court discussed only the situation in which the issue is whether either illegal or legal motives, but not both, were the "true" motives behind the decision. **It thus addressed the pretext case. [Emphasis added]**

N.L.R.B. v. Transportation Management Corp., supra, 462 U.S. at p. 400, n. 5.

In this case, of course, A. G. Boone definitely "disputes" and has disputed the question of whether the General Counsel, by a preponderance of evidence, "satisfied his burden" of proving that the Company made its terminal relocation and layoff decisions "at least in part because [its employees] engaged in protected activities."

As shown by the above quotation from this Court's **Transportation Management** decision and the body of the Court's opinion to which the quoted footnote relates, a burden of proof or persuasion upon an affirmative defense should be

imposed upon an employer respondent only in "dual motive" cases where the existence of unlawful motivation is conceded or is proved by a preponderance of evidence. The proof of unlawful motivation by a preponderance of evidence, of course, necessarily means that the burdens of proof and persuasion are imposed upon the General Counsel. The Court, as quoted above, clearly has specified that, upon "pretext" issues, the ultimate burdens of proof and persuasion at all times remain with the General Counsel.

In this case, and in previous cases, the Court of Appeals for the District of Columbia Circuit clearly but improperly has decided "pretext" issues, as well as "dual motive" issues, in accordance with the **Wright-Line** imposition of a respondent's burden of proof upon an affirmative defense.

> Nor do the Company's economic records evidence anything but that its asserted economic defense is a mere pretext in this context (Pet. App. 21).

See also, **Southwire Co. v. N.L.R.B.**, 820 F.2d 453 (D.C. Cir. 1987); **N.L.R.B. v. Gateway Theatre Corp.**, 818 F.2d 971 (D.C. Cir. 1987); **United Food Workers I. Union v. N.L.R.B.**, 768 F.2d 1463 (D.C. Cir. 1985); and **Possaic Daily News v. N.L.R.B.**, 736 F.2d 1543 (D.C. Cir. 1984).

The question in an unfair labor practice case arising under §8(a)(3) of the National Labor Relations Act is whether an employer was motivated by an intent to discriminate against an employee to discourage the employee's protected activity when the employer took an adverse employment action. The question in a Title VII employment discrimination case is whether an employer was motivated by an intent to discriminate against an employee because of the employee's race, sex, et

cetera, when the employer took an adverse employment action.

In a Title VII case, even when a plaintiff has proved a **prima facie** case, the defendant employer may prevail upon a showing of legitimate, non-discriminatory reasons, other than race, sex, **et cetera**, for an adverse employment action. The employer's burden of so showing, however, is only a burden of production or of going forward with evidence, and the burdens of proof and persuasion at all times remain with the plaintiff. See **Texas Department of Community Affairs v. Burdine**, 450 U.S. 248 (1981).

It is respectfully suggested that there is no rational or logical basis for holding that an employer defendant in a Title VII case has only a burden of production when such employer seeks to establish a legitimate, non-discriminatory

reason for an employment decision but that a §8(a)(3) employer respondent has burdens of proof and persuasion when such employer seeks to establish that he made a particular employment decision for legitimate, non-discriminatory business reasons. In **Texas Department of Community Affairs**, the Court held that the federal courts may not impose upon an employer defendant any burden of proof or persuasion even though an employee plaintiff has proved a **prima facie** case, albeit such proof would permit a finding in favor of the plaintiff.

It seems even less appropriate to permit the National Labor Relations Board, under the guise of statutory interpretation, to impose such burdens upon the mere proof of a **prima facie** case.

Again, in a §8(a)(3) unfair labor practice case, the motivational issue is whether or not "**the employee's protected**

conduct was a substantial or motivating factor in the adverse action." Under the holding of **Texas Department of Community Affairs**, an employer respondent in a §8 (a)(3) unfair labor practice case should have no burden of proof or persuasion on that issue, and the National Labor Relations Board should impose upon the General Counsel the burdens of proof and persuasion both in establishing a **prima facie** case and in any showing that the employer respondent's "articulated" reasons for an employment decision are pretextual.

It is respectfully asserted that findings and conclusions of discriminatory intent in §8(a)(3) unfair labor practice cases should be made, entered, and reviewed in accordance with the **Texas Department of Community Affairs** analytical framework. A. G. Boone denied that discriminatory

intent motivated its layoff and relocation decisions and offered evidence of legitimate business reasons for those decisions. The Company's evidence, instead of being weighed against the General Counsel's evidence, has been ignored on the theory that the Company had the burden of proof as to the true reasons for its decisions.

To the extent that the National Labor Relations Board also extends to employer respondents an affirmative defense, even when the record evidence justifies findings and conclusions of discriminatory intent, if the employer is able to show that the same action would have been taken regardless of such intent, the imposition upon the employer of a burden of proof would appear proper. On the issue of whether or not substantial record evidence supports findings and conclusions of discriminatory intent, however, which

was presented by A. G. Boone's petition for review of the National Labor Relations Board's Decision and Order, the Circuit Court's review should have been in accordance with this Court's allocation of the ultimate burden of proof as specified in **Texas Department of Community Affairs.**

Upon such proper review, A. G. Boone's showing of uncontradicted business reasons for its terminal relocation and layoff decisions would have resulted in denial of enforcement of the Board's remedial orders relative to those decisions.

CONCLUSION

A. G. Boone's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Lloyd C. Caudle
William L. Auten

Attorneys for the Petitioner